LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
AUG 25 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 72

DAVID WALTON CRAMP, JR.

Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA

Appellee.

Appeal From The Supreme Court of The State of Florida

BRIEF FOR APPELLANT

TOBIAS SIMON
Attorney for Appellant
706 Ainsley Building
Miami, Florida

HOWARD W. DIXON
Attorney for Appellant
Seybold Building
Miami, Florida

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	7
ARGUMENT	9-37
I. THE REQUIRED EXECUTION OF THE LOYALTY OATH PRESCRIBED BY THE FLORIDA STATUTES AS A CONDITION OF STATE EMPLOYMENT IS A VIOLATION OF THE FREEDOMS OF SPEECH, ASSOCIATION AND BELIEF.	9-22
II. THE FLORIDA STATUTE REQUIRING A LOYALTY OATH AS A CONDITION OF EMPLOYMENT IS A BILL OF ATTAINDER AND EX POST FACTO LAW.	22-28
III. THE REQUIRED EXECUTION OF THE LOYALTY OATH PRESCRIBED BY THE FLORIDA STATUTES IS AN ATTEMPT TO CONTROL THOUGHT AND TO COMPEL CERTAIN BELIEFS IN VIOLATION OF THE FIRST AMENDMENT.	28-31

INDEX (cont.)

Page

IV. THE PROVISIONS OF THE FLORIDA OATH ARE SO VAGUE AND UNCERTAIN AS TO DENY DUE PROCESS OF LAW. ..... 31 - 35

V. CONCLUSION ..... 36 - 36

MAILING CERTIFICATE 37

CASES CITED

Page

American Communications Association v. Douds, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 ..... 12, 13, 14, 25, 28, 33, 34

Beilan v. Board of Public Education, 357 U.S. 399, 2 L.Ed.2d 1414, 78 S.Ct. 1317 21

Cramp v. Board of Public Instruction, 125 So.2d 554 14

Cummings v. Missouri, (U.S.) 4 Wall 277, 18 L.Ed. 356 ..... 22, 27

DeVeau v. Braisted, 363 U.S. 144, 4 L.Ed.2d 1109, 80 S.Ct. 1146 25

Diez v. State, 97 So.2d 105 14

Ex Parte Garland, (U.S.) 4 Wall 333, 18 L.Ed. 366 24

Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 ..... 9, 11, 14, 15, 16, 24

Gerende v. Board of Supervisors, 341 U.S. 56, 95 L.Ed. 745, 71 S.Ct. 565 ..... 11, 14, 16

Konigsberg v. State Bar of California, 362 U.S. 910, 6 L.Ed.2d 105, 81 S.Ct. 101 ..... 10, 11, 21

Lerner v. Casey, 357 U.S. 468, 2 L.Ed.2d 1423, 78 S.Ct. 1311 21

McGowan v. Maryland, ... U.S. ....., 6 L.Ed.2d 393, 81 S.Ct. 18

CASES CITED (cont.)

Page

National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 ..... 11, 17

Nelson v. County of Los Angeles, 362 U.S. 1, 4 L.Ed.2d 494, 80 S.Ct. 527 21

Shelton v. Tucker, ... U.S. ....., 5 L.Ed.2d 231, 81 S.Ct. 247 ..... 19, 33

Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 ..... 10, 21, 29

Sweezy v. New Hampshire, 354 U.S. 234, 1 L.Ed.2d 1311, 77 S.Ct. 1203 12

Torcaso v. Watkins, ... U.S. ....., 6 L.Ed.2d 982, 81 S.Ct. 1680 ..... 10, 31

Watkins v. United States, 354 U.S. 178, 1 L.Ed.2d 1273, 77 S.Ct. 1173 11

Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 12

STATUTES CITED:

	Page
Florida Statute 876.01	6, 28
Florida Statute 876.05	2, 4, 5, 6, 27, 31
Florida Statute 876.06	2, 5, 6
Chapter 61-280 (Acts of Florida 1961)	22
28 U.S.C. 1257 (2)	2
29 U.S.C.A., Section 141, 159(h)	28, 34
50 U.S.C.A. 782	32
U. S. Constitution	
First Amendment	3, 6, 7, 8, 11, 18, 35
Fourteenth Amendment	3, 4, 6, 10, 11
Article I, Section 10	3, 4, 22

AUTHORITIES CITED:

O'Brian, **Loyalty Tests and Guilt by Association,** 61 Harvard L.R. 592 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 72

DAVID WALTON CRAMP, JR.

Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA

Appellee.

Appeal From The Supreme Court of The State of Florida

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinions, judgments and orders of the Supreme Court of Florida, and the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, in this case are reported at 125 So.2d 554 in the first instance and are unreported in the second. They appear at R. 11-19; 20.

JURISDICTION

The Judgment of the Supreme Court of Florida was filed November 16, 1960; Petition for Rehearing denied January 17, 1961. Appeal to Supreme Court of the United States was thereafter filed pursuant to 28 U.S.C. 1257 (2). Order of Supreme Court of the United States postponing Jurisdiction entered May 29, 1961.

QUESTION PRESENTED

Whether F.S. 876.05 and 876.06, which require the Appellant, as a teacher and an employee of the Board of Public Instruction of Orange County, Florida, a body corporate, and "all persons who now or hereafter are employed by or who now or hereafter are on the payroll of the State", execute the following oath:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ....., and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow

> of the Government of the United States or of Florida by force or violence."

are in violation of the Fourteenth Amendment to the Constitution of the United States, upon the grounds that they deny to the Appellant, the due process of law, and the equal protection of the laws; and are further in violation of the Fourteenth Amendment to the Constitution of the United States, upon the grounds that they deny to the Appellant freedom of speech, thought and association; and are further in violation of Article I, Section 10, of the Constitution of the United States, upon the ground that they constitute a Bill of Attainder and an ex post facto law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10, of the Constitution of the United States provides:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

F.S. 876.05 provides:

"All persons who are now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

'I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ....., and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.'

"And said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation."

F.S. 876.06 providess:

"If any person required by § § 876.05-876.10 to take the oath herein provided for fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving."

STATEMENT OF THE CASE

David Walton Cramp, Jr., is a teacher in the public school system in Orange County, Florida, and is an employee of the Board of Public Instruction of Orange County, Florida. At the time of the institution of this litigation (January 11, 1960), he had been such for nine years.

F.S. 876.05 and F.S. 876.06 had been enacted as C.25046 Laws of Florida, 1949. Nevertheless, the Appellant had not been asked to comply therewith until shortly prior to the within litigation. At that time, he was requested by his principal to correct the omission, and to execute the oath required by F.S. 876.05. Appellant refused on the grounds that the statutory requirement of the execution of the oath as a condition precedent to his continuing employment as a public school teacher was in violation of his rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and pertinent provisions of the Florida Constitution.

Appellant instituted suit in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, for declaratory relief pursuant to F.S. 87.01 to ascertain whether the Act was constitutional and whether or not he had to sign the oath as a condition of his continuing employment. On March 16, 1960, the Circuit Court declared the statute valid and that Cramp had to sign the oath. The Supreme Court of Florida, on appeal, affirmed the Court below in its Opinion filed November 16, 1960. This appeal to the Supreme Court of the United States followed.

SUMMARY OF ARGUMENT

We subscribe to the proposition that a State may exclude from its employ knowing members of the Communist Party; or others advocating, as an objective, the violent and forcible overthrow of the Government.

This end does not justify any means of achieving it. The exclusionary process cannot make unconstitutional demands upon the State's personnel; they cannot be required to forego the Bill of Rights for the privilege of endorsing a paycheck. The requirement of the execution of the loyalty oath prescribed by the State of Florida is just such a demand. It is invalid for several reasons.

I

A loyalty oath creates resistance to free inquiry, association and speech. This is State action in direct contravention of First Amendment freedoms. Even though it is held that free speech and association can be subordinated to the public interest, where the need is great, such is demonstrably not the case at Bar. America's need for academic freedom for hundreds of thousands of teachers and professors far outbalances any danger—undemonstrated in this case—of subversion taking root in the classroom.

Moreover, the loyalty oath is an inconsequential aid in the ferreting out of disloyalty. Its purported benefits are hardly worth the achieving without any price; how much less at its unbelievable cost in liberty and principle.

The attack upon First Amendment freedoms by

loyalty oaths generally becomes a blitzkrieg in the case of the Florida oath. This oath contains the peculiar characteristic of being completely retrospective—barring from State employment any person who had ever been implicated in forbidden activity, thought or belief. As such, it bears no reasonable relationship to the State's need in securing fit and competent teaching personnel. It stands, completely transparent, as a device solely to punish for past speech and association.

The State has other methods to secure fit and competent teaching staffs without destruction of First Amendment rights. Subversives can be excluded from its payroll in a manner that does no damage to our traditional concepts of burden of proof. Such alternatives are more efficacious; are consistent with due process of law; and their very existence pre-empts any claim the loyalty oath might assert for legitimacy and constitutionality.

II

The Statute prescribing the necessity for a loyalty oath further violates the constitutional prohibition against the Bill of Attainder and the ex post facto law. Florida's oath is completely retrospective. Thus, it seeks to punish for past conduct, thought and belief. A State that cannot find the room for a place of penitence is doing something other than prescribing qualifications for professions and vocations.

III

Florida's oath mounts its attack upon those who have at any time ever held certain beliefs. It is completely immaterial whether these beliefs were ever acted upon,

voiced or constituted an objective or a prophecy. Such a wide-sweeping prohibition is an open effort to monitor thought. No court in the United States has ever upheld such an ordinance.

IV

Florida's oath is so vague in its conditions and prohibitions that it denies due process of law.

ARGUMENT

I. THE REQUIRED EXECUTION OF THE LOYALTY OATH PRESCRIBED BY THE FLORIDA STATUTES AS A CONDITION OF STATE EMPLOYMENT IS A VIOLATION OF THE FREEDOMS OF SPEECH, ASSOCIATION AND BELIEF.

A State has the right to choose its own employees.

> "No unit of Government can be denied the right to keep out of its employ those who seek to overthrow the Government by force or violence, or are knowingly members of an organization engaged in such endeavor." (Frankfurter, J., concurring in part and dissenting in part in **Garner v. Board of Public Works**, 341 U.S.716, 725, 71 S.Ct. 909, 95 L.Ed. 1317, 1325.)

On the other hand, the State in exercising its power to hire employees of its own choosing has the responsibility not to utilize a constitutionally invalid system of exclusion.

> "The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by State-imposed criteria forbidden by the Constitution. This was settled in our holding in Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 219, 97 L.Ed. 216. We there pointed out that whether or not 'an abstract right to public employment exists,' Congress could not pass a law providing '. . . that no Federal employee shall attend Mass or take any part in missionary work'." **Torcaso v. Watkins,** ___ U.S. ___, 6 L.Ed.2d 982, 987, 81 S.Ct. 1680, 1684.

The prime barrier to State use of the loyalty oath is the Fourteenth Amendment and its incorporated freedoms of speech, association and belief. Despite any other purported achievement, the hallmark of the loyalty oath is that it compels disclosure of associations and beliefs. This is undeniably a restriction of these freedoms. **Speiser v. Randall,** 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332; **Konigsberg v. State Bar of California,** 362 U.S. 910, 6 L.Ed.2d 105, 81 S.Ct. 101.

As was stated by Justice Black, concurring in **Speiser v. Randall,** supra, at 2 L.Ed.2d 1460, 1476:

> "Loyalty oaths, as well as other contemporary 'security measures', tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which have played such a vital and beneficial role in the history of this Nation. The result is a stultifying

> conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be . . . I am certain that loyalty to the United States can never be secured by the endless proliferation of 'loyalty' oaths. . . "

To those to whom any State action deterring or restricting speech and association is in itself a violation of the Constitution ("The recognition that California has subjected 'speech and association to the deterrent of subsequent disclosure' is under the First Amendment sufficient in itself to render the action of the State unconstitutional . . . " Black, J., dissenting in **Konigsberg v. State Bar of California**, supra, at 6 L.Ed.2d 105, 122), the requirement of a loyalty oath as a condition of employment is ipso facto bad.

To those who regard First Amendment protections as being not absolute but as qualified by the demands of the State balanced (or pitted) against the rights of the individual, when the subordinating interests of the State predominate, the individual rights of speech, privacy and association must give way. **Watkins v. United States**, 354 U.S. 178, 1 L.Ed.2d 1273, 77 S.Ct. 1173; **National Association for the Advancement of Colored People v. Alabama**, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163.

Under this latter view, execution of loyalty oaths as a condition of employment or other Governmental benefit has been upheld as against the First and Fourteenth Amendment rights of municipal employees (**Garner v. Board of Public Works**, supra), candidates for public office (**Gerende v. Board of Supervisors**, 341 U.S. 56, 95

L.Ed. 745, 71 S.Ct. 565), and labor union officers (**American Communications Association v. Douds**, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674). In each of these cases, there was presumably an evil within the sphere of Governmental concern that had to be corrected; the use of a loyalty oath could correct it; and this combination outweighed and outbalanced the interests of the particular individuals which were admittedly invaded by the loyalty oath requirement.

However, the holdings in the foregoing cases are not to be enlarged so as to engulf this one. No matter that the personal liberties of municipal employees were regarded as expendable to some State need; the importance of unimpeded thought and the right of exploration for teachers unhampered by stifling loyalty oaths far exceeds that of any other profession or vocation. In **Sweezy v. New Hampshire**, 354 U.S. 234, 250, 1 L.Ed.2d 1311, 1324-1325, 77 S.Ct. 1203, this Court held:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate."

In **Wieman v. Updegraff**, supra, Mr. Justice Frankfurter stated at 97 L.Ed. 216, 225:

> "To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for

> responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State Government."

Mr. Justice Frankfurter further stated therein, concerning the loyalty oath which the State of Oklahoma attempted to prescribe as a condition precedent to teachers' employment:

> "It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." (97 L.Ed. 216, 224)

Moreover, ours is not a case, as was the situation in **American Communications Association v. Douds**, supra, where the "discouragements" of the loyalty oath "touches

only a relative handful of persons". Here the requirement of the loyalty oath, if upheld, will have deleterious effects upon the liberties of tens of thousands of teachers in the State of Florida and hundreds of thousands striving for academic freedom throughout the United States.

Further, the Florida oath is different from those involved in **American Communications Association v. Douds, Gerende, Garner** (supra). The Florida oath requires disclosures into the unending past. This Court may have been willing to accept the swath cut across protected rights by an oath demanding disclosures of current associations; but it is a different matter to approve the devastation caused by an oath that demands complete information regarding all prior association, advocacy and belief.

Florida prohibits the employment of any person who was ever a knowing (**Diez v. State**, 97 So.2d 105) Communist, regardless of his then age, circumstance or his subsequent change of heart. (Interestingly, Florida does not bar from employment one who once believed in the overthrow of the Government but no longer does so.) There is no room in Florida for penitence or reflection. Having once danced around the golden calf, banishment is eternal. (**Diez v. State**, supra, **Cramp v. Board of Public Instruction**, supra). Yet, it was just because return to grace was permitted that a loyalty oath required of labor union officers was sustained in **American Communications Association v. Douds**, supra, (94 L.Ed. 925, at 952).

> "This distinction is emphasized by the fact that members of those groups identified in Section 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past.

> Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in Section 9(h), is not a bar to resumption of the position. In the cases relied upon by the union on the other hand, this Court has emphasized that since the basis for disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See United States v. Lovett . . . Cummings v. Missouri . . . Here the intention is to forestall future dangerous acts; there is no one who may not be a voluntary alternation of the loyalty which impel him to action become eligible to sign the affidavit."

In **Garner v. Board of Public Works**, supra, the California legislature in 1941 amended the Charter of the City of Los Angeles to provide that no person could hold office who, within five years prior to the Act, advocated the Government's overthrow by violence. However, the effectuating ordinance was not passed by the City of Los Angeles until 1948. Here, at worst, was but a five-year retrospective provision, as distinguished from the eternally retrospective portions of the Florida oath. Yet, the Court said:

> "The ordinance would be ex post facto if it imposed punishment for past conduct lawful at the time it was engaged in. Passing for the moment the question whether separation of petitioners from their employment must be considered as punishment, the ordinance is clearly not ex post facto. The activity covered by the oath had been proscribed by the Charter in the same terms, for the same purpose, and to the same effect over

seven years before, and two years prior to the period embraced in the oath." (95 L.Ed. 1317, at 1323)

In Gerende v. Board of Supervisors, supra, the Supreme Court of the United States upheld the Maryland law that required a candidate for public office execute an oath that "he is not a person who engaged in one way or another in the attempt to overthrow the Government by force or violence" (emphasis added). It is quite clear from the statement of the Supreme Court of the United States in Garner v. Board of Public Works, supra, that the exclusion from office was justified only on the grounds that the candidate "currently espoused" a program against the Government (95 L.Ed.1317, at 1330).

The State of Florida will say that it has a need for the execution of loyalty oaths; that its incursion into protected freedoms is justifiable in view of the State's need in securing fit and competent teaching personnel free of the taint of disloyalty and subversion.

Whatever the right of a State to secure fit and competent teachers, it is clear that the State has no need for the loyalty oath. The loyalty oath fulfills no legitimate State function. It is, at best, an inept tool. It has been stated, "The validity of an oath must be judged on the assumption that it will be taken conscientiously," Garner v. Board of Public Works, supra, 95 L.Ed. 1317, at 1326. Herein lies the fallacy. One dedicated to the overthrow of the Government by force and violence will hardly refrain from signing a false oath. Only persons of principle will be caught in the entanglements of reiterated oath taking. The State cannot advance its program of extirpating sub-

versives from its employment rolls by means of loyalty oaths. The system simply does not work.

Furthermore, where a State seeks associational ties extending back to the date of the birth of an adult teacher, it is rather apparent that it is no longer imposing qualifications for positions. It is doing nothing less than imposing punishment for past conduct, opinion and belief. This is not the type of ballast that will create a balance in favor of the State.

In **National Association for the Advancement of Colored People v. Alabama**, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163, the State of Alabama sought to secure the Association's membership list and gave as its reason that it was seeking to determine whether the Association was conducting intrastate business in violation of Alabama's corporation registration statute. The Court asked, "Whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members on their constitutionally protected right of association," 2 L.Ed.2d 1488, at 1500.

The Court held:

> "Whether there was 'justification' in this instance turns solely on the **substantiality** of Alabama's interest in obtaining the membership list." (Emphasis added) 2 L.Ed.2d 1488, at 1501.

In the case at Bar, the State has claimed a need for the disclosure but has demonstrated none. The method utilized by the State while destructive of liberty does not

advance the State's interest in securing fit and competent teachers in any manner at all.

Therefore, we submit that if the preservation of First Amendment rights are to depend upon their weight in any particular case as opposed in each instant to the need of the State, the balance must be struck in the case at Bar in favor of Appellant on behalf of all teachers throughout the United States.

Nevertheless, if the State's interests are paramount —here, in securing fit and competent teachers—the State still is not free to subjugate liberties if its desired ends can be alternatively achieved in a manner which leaves the people's freedoms alone. In **McGowan v. Maryland**, ... U.S. ....., 6 L.Ed.2d 393, 81 S.Ct. ....., this Court stated the foregoing principle in a case involving religious liberty; but the effect remains the same regardless of which First Amendment freedom is involved:

> "This is not to say that Governmental regulations which find support in their appropriateness to the achievement of secular, civil ends are invariably valid under the First or Fourteenth Amendments whatever their effects. . . If the value to the State of achieving the object of a particular r e g u l a t i o n is demonstrably outweighed by the impediment to which the regulation subject those whose religious practices are curtailed by it, **or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained.**" (Emphasis added)

Or, putting the matter only slightly differently, this Court said, in **Shelton v. Tucker,** ..... U.S. ....., 5 L.Ed.2d 231, 237, 81 S.Ct. 247, in a case involving academic freedom and liberty of association for teachers:

> "In a series of decisions this Court has held that, even though the Governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (5 L.Ed.2d 231, at 237)

Thus, those who adhere to the "balance theory" of First Amendment liberties, once they have found a subordinating State interest, must then use a second weighing scale. They must choose the best of possible alternatives. As between methods that can be used to exclude subversives from the teaching profession, that one must be chosen which has the least harmful effect upon, and which will be most likely to preserve, the teacher's rights and liberties.

In **Shelton v. Tucker,** supra, Arkansas required its teachers to file an affidavit listing every organization to which they had belonged or had regularly contributed during the preceding five-year period. The Supreme Court of the United States held:

> "The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehen-

> sive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." (5 L.Ed.2d 231, at 238)

The sweep of the Florida loyalty oath is an even more comprehensive interference with academic freedom and personal belief. In **Shelton**, the State was (in theory at least) only seeking information. This information could not be used to improperly discharge the teacher. As Mr. Justice Frankfurter said in dissent (5 L.Ed.2d 231, at Page 242):

> "Of course, if the information gathered by the required affidavits is used to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the Fourteenth Amendment. It will be time enough, if such use is made, to hold the application of the statute unconstitutional. See Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220."

In the case at Bar, the time of "running afoul" has already arrived. The Florida loyalty oath requires one-time organizational membership to mean automatic and immediate discharge. It means that an ancient, short membership, in the Communist Party, no matter how speedily terminated, forever bars all possibility of pursuing State employment as a teacher. This, we submit, has no bearing on teacher competence, or on exclusion of subversives.

An alternative to the loyalty oath as a means of achieving the State's purported goals is an employer investigation. Where any basis exists for questioning the loyalty of a teacher—and teachers have not gone unnoticed during the past fifteen years of increasing conformity—he may be called in for questioning. This has become approved procedure in cases involving lawyers (**Konigsberg v. State Bar of California**, supra), teachers (**Beilan v. Board of Public Education**, 357 U.S. 399, 2 L.Ed. 2d 1414, 78 S.Ct. 1317), subway engineers (**Lerner v. Casey**, 357 U.S. 468, 2 L.Ed.2d 1423, 78 S.Ct. 1311), and county employees (**Nelson v. County of Los Angeles**, 362 U.S. 1, 4 L.Ed.2d 494, 80 S.Ct. 527).

This Court has imposed the requirement that frank and forthright answers must be forthcoming from the employee. Obviously, the State's interests are well protected; its burdens small.

Yet, whatever one may question concerning this procedure it represents a considerable advance over the blanket loyalty oath requirement. Some semblance of due process is maintained. Privacy may be assured. An opportunity is given to make explanations. Answers can be weighed. (It is just possible that one who was a Communist in the disillusioning 1930's could have changed his mind and have used the interim period to become an otherwise competent teacher.) Discharge need not be automatic. The burden of proof can be righted. (This last point is most important. As Mr. Justice Douglas said in **Speiser v. Randall**, supra:

> "The State by the device of the loyalty oath places the burden of proving loyalty on the citi-

zen. That procedural device goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established. This technique is an ancient one that was denounced in an early period of our history.")

Of not the least importance is the fact that the State of Florida has for the first time adopted an Administrative Procedure Act which would apply to such an employer investigation in the case at Bar and for most other State employees (Chapter 61-280 Acts of Florida 1961; effective July 1, 1961). This Act guarantees a hearing and the requirements of due process of law.

II. THE FLORIDA STATUTE REQUIRING A LOYALTY OATH AS A CONDITION OF EMPLOYMENT IS A BILL OF ATTAINDER AND EX POST FACTO LAW.

The Statute requiring the execution of a loyalty oath as a condition precedent to public employment in the State of Florida is a Bill of Attainder and an ex post facto law in violation of Article I, Section 10, of the United States Constitution. The proof of this is to be found in the landmark decision of **Cummings v. Missouri** (U.S.), 4 Wall 277, 18 L.Ed. 356, wherein the Court held that a Catholic priest could not be required to sign the loyalty oath prescribed by the Missouri Constitution as a condition of saying mass. The Court stated:

"If the clauses of the Second Article of the Constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having

been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States and, therefore, should be deprived of the right to preach as a priest of the Catholic church, or to teach in any institution of learning, there could be no question that the clauses would constitute a Bill of Attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

"The results which would follow, from the clauses of the character mentioned, do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priest and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The

> deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law maker in the case would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows."

In **ex parte Garland** (U.S.), 4 Wall 333, 18 L.Ed. 366, the Supreme Court struck down the Congressional requirement that attorneys subscribe to an oath of loyalty to the United States as a precedent condition to their right to practice law. That court of the year 1866 stated:

> "The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be affected indirectly by a State under the form of creating qualifications we have held in the case of Cummings v. Missouri, and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress."

It is true that in **Garner**, supra, a majority of the Court upheld the requirement of a loyalty oath as a con-

dition of employment for municipal employees as against the contention that the same constituted a Bill of Attainder. However, that Court found that "punishment is a prerequisite" and found that there was no punishment because the Los Angeles Charter and ordinance declared **prospectively** operative standards of eligibility for public employment.

In **American Communications Association v. Douds,** supra, this Court sustained the statutory requirement of a loyalty oath as against the contention that it was a Bill of Attainder and stated that there was no punishment involved since the statute did not punish individuals concerned for past actions but subjected them only to possible loss because of **future conduct.**

In **DeVeau v. Braisted,** 363 U.S. 144, 4 L.Ed.2d 1109, 80 S.Ct. 1146, the Supreme Court upheld the constitutionality of Section 8 of the New York Waterfront Commission Act of 1953 denying certain rights to unions, any of whose officers or agents had been convicted of a felony. The court held that such an action was not invalid as a Bill of Attainder or ex post facto law stating:

> "Finally, Section 8 of the Waterfront Commission Act is neither a Bill of Attainder nor an ex post facto law. The distinguishing feature of the Bill of Attainder is the substitution of a legislative for a judicial determination of guilt. See United States v. Lovett, 328 U.S. 303, 90 L. Ed. 1252, 66 S.Ct. 1073. Clearly, Section 8 embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction; and so it manifestly is not a Bill of At-

> tainder. The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. See Hawker v. New York (U.S.) supra. No doubt is justified regarding the legislative purpose of Section 8. The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony."

The Florida statute is devoid of measures which would permit it to escape being a Bill of Attainder or ex post facto law as in the last cited cases. The Florida statute does not operate prospectively only. It reaches into the past and punishes for past conduct since past conduct alone is ground for discharge. There can be no pretense that this is an effort to establish qualifications for teaching personnel. The Act does not permit a one hundred percent anti-Communist to teach if he had strayed off the straight and narrow path for even one moment in his youth. Such an individual could have spent the next twenty years in acquiring college degrees and in writing tracts on the dangers of Communism. Nevertheless, his bar to teaching in Florida would be as great

and impregnable as if he had been Khrushchev himself. Clearly, the Florida Act reaches the person and not the calling.

The Florida Act violates the prohibitions of the closely related ex post facto clause of the Constitution. By an ex post facto law

> " . . . is meant one which imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." **Cummings v. Missouri**, supra, at Page 364.

Thus, had a man been a Communist prior to 1949, when F.S. 876.05 was enacted, an act which at that time did not carry any punishment nor was it illegal, he would subsequently have been punished by being barred from the teaching profession as a consequence of his prior membership.

Sustaining the Florida loyalty oath will permit the punishment of any person at any time for any act which offends the wishes of the temporary majority. As was stated in **Cummings v. Missouri**, supra, at Page 365:

> "Suppose that, in the progress of events, persons now in the minority in the State should obtain the ascendancy, and secure the control of the Government; nothing could prevent, if the constitutional prohibition can be evaded, the enact-

ment of a provision requiring every person, as a condition of holding any position of honor or trust, or of pursuing any avocation in the State, to take an oath that he had never advocated or advised or supported the imposition of the present expurgatory oath. Under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted; and individuals, and even whole classes, may be deprived of political and civil rights."

III. THE REQUIRED EXECUTION OF THE LOYALTY OATH PRESCRIBED BY THE FLORIDA STATUTES IS AN ATTEMPT TO CONTROL THOUGHT AND TO COMPEL CERTAIN BELIEFS IN VIOLATION OF THE FIRST AMENDMENT.

Florida bars from State employment not only those who **join** organizations but those who **believe** in certain forbidden ideas and concepts as well: "That I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" (F.S. 876.01).

A similar provision was found in the now repealed Section 9(h) of the Labor Management Relations Act, 29 U.S.C.A., Sections 141, 159(h). Admittedly, this provision was sustained against attack by a 3-3 decision in **American Communications Association v. Douds**, supra. Those voting to affirm, however, were obliged to incorporate a gloss upon the statute because "the breadth of the provision concerning belief in overthrow of the Government by force would raise additional questions, how-

ever, if it were read very literally to include all persons who might, under any conceivable circumstances, subscribe to that belief."

It was necessary, therefore, in the opinion of the court to modify the plain and clear language that purportedly proscribed mere belief.

> "The Congressional purpose is therefore served if we construe the clause, 'that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods', to apply to persons and organizations who believe in violent overthrow of the Government as it presently exists under the Constitution **as an objective, not merely a prophecy.**" (Emphasis added) 94 L.Ed. 925, 948.

On this point, the decision of the court was succinctly stated:

> "We hold, therefore, that the belief identified in Section 9(h) is a belief in the **objective** of overthrow by force or by any illegal or unconstitutional methods of the Government of the United States as it now exists under the Constitution and the laws thereof." (Emphasis added) 94 L.Ed. 925, 948-949.

In **Speiser v. Randall**, supra, California required veterans to execute the following oath as a condition of obtaining certain tax exemptions:

> "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities."

The Supreme Court of the United States struck down the required oath on the ground that the statutory procedure placed the burden of proof and persuasion of non-engagement in the proscribed advocacy on the taxpayer. However, the "advocacy" that California sought to prohibit was defined as something more than the word itself might otherwise suggest. As was stated in a footnote to the opinion:

> "The California Supreme Court construed these provisions as inapplicable to mere belief. On oral argument counsel for the taxing authorities further conceded that the provisions would not apply in the case of advocacy of mere 'abstract doctrine'. See Yates v. United States, 354 U.S. 298, 312-327, 1 L.Ed.2d 1356, 1371-1379, 77 S.Ct. 1064."

The Supreme Court of the United States clearly indicated that an attempt to proscribe abstract doctrine or mere belief must fail; and that dictating beliefs as a condition of Governmental benefit (and presumably a job) must fail.

The Florida oath proscribes mere belief and makes mere belief a ground of exclusion from the teaching profession. This is thought control; Florida seeks to become

the Big Brother to its employees. Nowhere in the opinion of the Supreme Court of Florida (125 So.2d 554) is any restriction placed upon the meaning of the word "believe" and its wide unfettered scope remains; as such, it serves as another reason to defeat the requirement of the oath as a condition of employment.

In **Torcaso v. Watkins,** U.S. , 6 L.Ed.2d 982, 81 S.Ct. 1680, the Supreme Court of the United States held that a State cannot compel a belief in the existence of God as a test for office in the State of Maryland.

Let it be said that neither can the State of Florida compel a belief of any type for the privilege of being a teacher in the Orange County schools.

IV. THE PROVISIONS OF THE FLORIDA OATH ARE SO VAGUE AND UNCERTAIN AS TO DENY DUE PROCESS OF LAW

Certain of the offending portions of the Florida oath are at least clear and unambiguous. One knows, for example, whether or not one is a "member of the Communist Party" (F.S. 876.05).

It is another matter, however, to be required to swear that one has not lent "aid, support, advice, counsel or influence" to that organization.

One may or may not know whether he believes "in the overthrow of the Government of the United States or of the State of Florida by force or violence," but how can one be required to swear that he is "not a member

of any organization or party which believes in or teaches directly or indirectly, the overthrow of the Government . . . by force or violence".

The authors of this brief have not lent "aid, support, advice, counsel or influence" to the Communist Party. Yet, innumerable citizens are quite content to feel to the contrary, solely by reason of our representation of the Appellant in this case. There are many in some geographic locations who espouse the doctrine that supporters of public school integration are giving support to the Communist Party; while United States Government officials have publicly stated that those resisting integration are aiding the forces of Communism.

Aiding or resisting Communism are concepts blurred by emotion in today's world. Very often the difference lies only in whether the other fellow agrees with you or not. Those intent upon dragooning advocates of social reform into the pro-Communist camp have not been limited to the ignorant; but have included Judges, prosecutors and legislators, and candidates for all these offices. At least this is true in Florida, and we doubt the situation is better elsewhere.

What is sometimes sought to be done to individuals is more freely attempted for organizations, possibly since the latter do not have the dubious advantage of the libel laws. Categorization of organizations began several years ago, and has since found its way into Executive orders and Congressional enactments. Conceivably, one could wend one's way through Communist organizations, and Communist front organizations and Communist-infiltrated organizations. 50 U.S.C.A. 782.

However, to be required to ascertain whether any other organization "indirectly" follows the Communist line, is to surrender completely to hopeless confusion.

By reason of the uncertainty of the scope of the clauses of the Florida oath, one who executes it, is placed at the mercy of unsympathetic Judges and juries. There may not be much hesitancy in reaching a verdict that someone who is unpopular is also subversive and therefore a perjurer. Nor, as Justice Frankfurter said in **American Communications v. Douds, supra, 94 L.Ed. at 955,**

> "It does not meet the difficulty to suggest that the hazard of a prosecution for perjury is not great since the convictions for perjury must be founded on willful falsity. To suggest that a Judge might not be justified in allowing a case to go to a jury, or that a jury would not be justified in convicting, or that, on the possible happening of these events, an appellate court would be compelled to reverse, or, finally, that resort could be had to this Court for review on a petition for certiorari, affords safeguards too tenuous to neutralize the danger."

The plight of organizations was adroitly noted by Mr. Justice Stewart in **Shelton v. Tucker**, supra, where he noted,

> "In the State court proceedings a witness who was a member of the Capital Citizens Council testified that his group intended to gain access to some of the Act 10 affidavits with a view

> to eliminating from the school system persons who supported organizations unpopular with the group. Among such organizations he named the American Civil Liberties Union, the Urban League, the American Association of University Professors, and the Women's Emergency Committee to Open Our Schools."

It is a small step to add other "out" groups. The effort to adjudge them "indirect" proponents of Communism might be unnoticeable.

In **American Communications Association v. Douds**, supra, Justice Frankfurter dissented from the majority upholding the validity of a loyalty oath, on the ground that the statute prescribing it was void for uncertainty. Compared to the Florida oath the provisions of 29 U.S. C.A. 159(h) therein involved were stark rigid and positive both in outline and detail. Yet it was stated: (94 L.Ed. 955)

> "In my view Congress has cast its net too indiscriminately in some of the provisions of Section 9 (h)" and "ask(s) assurances from men regarding matters that open the door too wide to mere speculation or uncertainty . . . If a man has scruples about taking an oath because of uncertainty as to whether it encompasses some beliefs that are inviolate, the surrender of abstention is invited by the ambiguity of the congression exaction . . .
>
> ". . . I cannot deem it within the rightful authority of Congress to probe into opinions that involve only an argumentative demonstra-

tion of some coincidental parallelism of belief with some of the beliefs of those who direct the policy of the Communist Party, though without any allegiance to it. To require oaths as to matters that open up such possibilities invades the inner life of men whose compassionate thought or doctrinaire hopes may be as far removed from any dangerous kinship with the Communist creed as were those of the founders of the present orthodox political parties in this country." (94 L.Ed. 956)

V. CONCLUSION

It is respectfully submitted that the Florida Statutes should be stricken as invalid and un-constitutional. Execution of a loyalty oath cannot be made a condition of the right to teach. Elimination of the oath requirement will in no way interfere with the State's goal of obtaining fit and competent teachers; nor will it prevent the imposition of honest and legitimate qualifications for a teacher's license; nor will it mean that the State is prohibited from excluding subversiveness from its employ.

Basically, the oath is neither designed nor fitted to achieve any of these. Its only function is to punish for past conduct, affiliation or belief in no way connected with present qualification or ability as a teacher.

While the State's purposes may be more easily and better accomplished in other ways, the removal of the oath requirement will remove a great weight from First Amendment freedoms of expression, association and belief.

Perhaps a non-judicial expression best seems to illustrate the true place of loyalty oaths in a free society. Governor Alfred E. Smith, in signing bills repealing the New York Lusk Laws of 1921, said of the loyalty commitments that had been required of teachers,

> "They are repugnant to the fundamentals of American democracy. Under the laws repealed, teachers, in order to exercise their honorable calling, were in effect compelled to hold opinions as to Governmental matters deemed by a State officer consistent with loyalty; and, further, no private school could be maintained in this State unless its teachings were similarly satisfactory to certain officials of the State. Freedom of opinion and freedom of speech were by these laws unduly shackled, and an unjust discrimination was made against the members of a great profession." O'Brian, **Loyalty Tests and Guilt by Association**, 61 Harvard L.R. 592, 595-596 (1948).

Respectfully submitted

TOBIAS SIMON
706 Ainsley Building
Miami, Florida,
and
HOWARD W. DIXON
Seybold Building
Miami, Florida

Attorneys for Appellant

CERTIFICATE OF MAILING

I, TOBIAS SIMON, Attorney for Appellant and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 24, 1961, I served copies of the foregoing Brief for Appellant on the Appellee, THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, by mailing a copy thereof in a duly addressed envelope with postage prepaid to the office of J. R. WELLS, ESQ., c/o Maguire, Voorhis & Wells, 135 Wall Street, Orlando, Florida, and further mailing a copy thereof to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

TOBIAS SIMON